

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1935.

No. 15, Original.

COMMONWEALTH OF KENTUCKY, PETITIONER,

vs.

ANDREW M. J. COCHRAN.

Petition for Writ of Mandamus.

BRIEF FOR THE PETITIONER IN REPLY.

I.

The fourteenth amendment prohibits action by States and not by individuals, and authorizes only legislation to correct or redress State action.

Civil Rights Cases, 109 U. S., 3, 11.

James vs. Bowman, 190 U. S., 127, 136.

Virginia vs. Rives, 100 U. S., 313, 318.

The defendant's right, under the fourteenth amendment, is limited to immunity from action by the State. If the laws of the State are not repugnant to the fourteenth amendment, errors in their administration are not ground for re-

moval, but only for writ of error after final judgment in the State court.

II.

Where a State, acting through its judicial department, has violated the fourteenth amendment "*the final judgment* of the State court is to be deemed the act of the State within the meaning of that amendment," as said by Mr. Justice Harlan in *Chicago, Burlington and Quincy Railroad Company vs. Chicago*, 166 U. S., 226, 235. At page 241 the learned justice said :

"In our opinion the *judgment* of a State court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the Constitution of the United States, and *the affirmance of such judgment* by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

In *Virginia vs. Rives*, 100 U. S., 313, 320, Mr. Justice Strong said that section 641 "was not intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial."

In *Lent vs. Tillson*, 140 U. S., 316, 331, Mr. Justice Harlan said :

"But errors in the mere administration of the statute, not involving jurisdiction of the subject and of the parties, could not justify this court in its re-examination of the judgment of the State court, upon writ of error, to hold that the State had deprived, or was about to deprive, the plaintiffs of their property without due process of law."

III.

To show that the laws of the State provide for the impartial selection of jurors we refer to the following sections of

the General Statutes of Kentucky in addition to those cited at pages 6 to 9 of our brief:

"SEC. 1300. If a sheriff or other officer corruptly, or through favor or ill will, summon a juror with intent that such juror shall find a verdict for or against either party, or shall summon a grand juror from the like motives, with the intent that such grand juror shall or shall not find an indictment against any particular individual, he shall be fined not exceeding five hundred dollars, and forfeit his office and be forever disqualified from holding any office in this Commonwealth."

Section 968 provides for the selection of another judge "if either party shall file with the clerk of the court his affidavit that the judge will not afford him a fair and impartial trial."

On Caleb Powers' appeal from his second conviction the court held that an affidavit was sufficient to disqualify a judge under this statute, which alleged that the judge was hostile and would not afford the defendant a fair and impartial trial, and that at the first trial he had taken steps to select a jury composed of partisans in sympathy with the prosecution (*Powers vs. Commonwealth*, 114 Ky., 237, 257).

IV.

Section 641, in providing for removal where a defendant is denied or cannot enforce "any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States," refers to sections 1977 and 1978 of the Revised Statutes. Mr. Justice Strong so said in *Strauder vs. West Virginia*, 100 U. S., 303, 311, and a reference to the original act leaves no doubt upon the subject (act of April 9, 1866, c. 31, secs. 1, 3; 14 Stat., 27). Section 1 of that act is the same as sections 1977 and 1978 of the Revised Statutes, and section 3 provides for removal where the rights given by section 1 are denied or cannot be enforced.

The "plain object" of sections 1977 and 1978, as Mr. Justice Strong said in *Virginia vs. Rives*, 100 U. S., 313, 318, "was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."

The sections are as follows:

"SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

"SEC. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

We submit that the clause of section 641, which is relied upon, does not provide for removal by white persons.

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